

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

STEVE HAWLEY,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES,

Respondent.

) Case No. SEP-02-0001

)  
) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

**I. INTRODUCTION**

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair, and BUSSE NUTLEY, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on April 9, 2003.

1.2 **Appearances.** Appellant Steve Hawley was present and was represented by William M. Wood, Attorney at Law of Meikle & Wood. Janetta Sheehan, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a non-disciplinary separation pursuant to WAC 356-30-012.

1.4 **Citations Discussed.** WAC 356-30-012; Akridge v. Dep't of Social & Health Services.

## II. FINDINGS OF FACT

2.1 For historical review and discussion of the background check law, see Akridge v. Dep't of Social & Health Services, Case No. SEP-01-0001 (2003).

2.2 Appellant Steve Hawley was a permanent employee of Respondent Department of Social and Health Services. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on May 2, 2002.

2.3 Appellant began his employment with the Department of Social and Health Services in July 1995. On August 8, 2000, Appellant was hired by the Special Commitment Center as a Forensic Therapist 2. In December 2001, Appellant was promoted to a position as a Forensic Therapist 3.

2.4 Following the Personnel Resources Board's adoption of WAC 356-30-012, DSHS classified all positions at the Special Commitment Center as "covered positions" because of the necessary contact staff had with court committed sexually or mentally ill offenders. The only exceptions were two positions located in the Special Commitment Center's business office. Appellant's position was classified as a "covered position" in August 2000.

2.5 As a Forensic Therapist 3, Appellant's duties included directing the care, custody, evaluation, and treatment of sexually or mentally ill offenders. Appellant utilized group therapy and psycho-educational techniques and provided counseling to the committed offender's families.

2.6 On October 22, 2001, Appellant signed a background authorization form. Appellant answered "yes" in response to the question, "have you ever been found to have sexually abused,

1 physically abused, neglected or abandoned, or exploited a child or adult.” Appellant indicated that  
2 he had “inappropriate sexual relations with a client.”

3  
4 2.7 On January 16, 2002, five members of the Background Assessment Review Team (BART)  
5 met to review Appellant’s Background Check Risk Assessment Documentation Form. Information  
6 from the Department of Health indicated that Appellant’s registration to practice as a counselor in  
7 the state of Washington had been revoked for a period of ten years, effective June 1999. BART  
8 decided to “automatically disqualify” Appellant from working in a covered position.

9  
10 2.8 On February 8, 2002, the Background Check Central Unit (BCCU) notified Appellant of the  
11 determination that he was disqualified from working in his covered position because it allowed  
12 unsupervised access to “vulnerable adults.” A copy of this determination was forwarded to  
13 Appellant’s appointing authority, Mark Seling, Superintendent of the Special Commitment Center.

14  
15 2.9 On February 13, 2002, Superintendent Seling notified Appellant that he could not remain in  
16 his covered position and that he had 15 calendar days from the day he received that letter to submit  
17 a request for a “Reviewing of Mitigating Circumstances.”

18  
19 2.10 On February 13, Appellant requested a “face to face” Mitigating Circumstances Review.

20  
21 2.11 On March 13, 2002, following a review of Appellant’s mitigating circumstances, BART  
22 notified Appellant that “after careful consideration of the information you provided, the BART  
23 determination remains unchanged.”

24  
25 2.12 Superintendent Seling received a copy of the March 13, 2002, notice from BART.  
26

1 2.13 Personnel Policy 532, Section VI B, requires that BART attempt to find a suitable non-  
2 covered position within the employee's current administration before considering positions in other  
3 administrations. On April 11, 2002, Secretary Administrative Jackie Bekken generated a search of  
4 vacancies located in Pierce County within the salary ranges of 31 to 51. Ms. Bekken obtained a list  
5 of vacancies as of April 7. On April 12, Ms. Bekken generated a similar search of vacancies  
6 located in Kitsap County as of April 7. Ms. Bekken eliminated from consideration all vacant  
7 "covered positions." After reviewing Appellant's qualifications to the available positions, Ms.  
8 Bekken found no vacant, permanent funded positions which could be offered to Appellant.

9  
10 2.14 By letter dated April 18, 2002, Superintendent Seling notified Appellant of his non-  
11 disciplinary separation from his position as a Forensic Therapist 3, effective at the end of his shift  
12 May 3, 2002. Superintendent Seling informed Appellant that "[d]ue to the nature of SCC, where all  
13 positions are covered by Personnel Policy 532, Employment Background Checks, job restructuring  
14 and job reassignment are not viable options. Attempts to locate a position that would represent a  
15 transfer or voluntary demotion for you were unsuccessful." The letter also advised Appellant that  
16 he could request to have his name placed and/or maintained on agency promotional registers within  
17 three years of the effective date of the action.

### 18 19 **III. ARGUMENTS OF THE PARTIES**

20 3.1 Respondent argues that DSHS followed the procedures established by both WAC 356-30-  
21 012 and DSHS Policy 532. Respondent argues that BART considered information that Appellant's  
22 license to counsel others was revoked as a result of a "violation of a trust relationship with a client."  
23 Respondent argues that BART members were in the best position to make a determination as to  
24 whether, based on his character, Appellant was suitable and competent to continue working in a  
25 covered position. Respondent argues that BART ultimately determined that Appellant could not  
26 continue to work with institutionalized individuals at the Special Commitment Center. Respondent

1 argues Superintendent Seling had limited options available because only two positions at the  
2 Special Commitment Center were not covered by Policy 532 and neither position was vacant.  
3 Respondent argues that non-disciplinary separation was the only option, and therefore, the appeal  
4 should be denied.

5  
6 3.2 Appellant argues that the appointing authority and BART both failed to follow DSHS  
7 policy 532 when they did not consider and take into account his mitigating circumstances.  
8 Appellant first argues that when he initially applied for the Forensic Therapist 2 position at the  
9 Special Commitment Center, he advised two of his supervisors that his counselor license had been  
10 revoked by a state licensing board. Appellant argues the background check completed in 2000  
11 cleared him for appointment to a position with the Special Commitment Center. Appellant  
12 contends there is no reason to believe that his license revocation was not discovered during this first  
13 background check. Appellant argues that BART's decision to disqualify him from remaining in his  
14 covered position, after the second background check, was in contradiction to the appointing  
15 authority's earlier decision to hire him as an employee at the Special Commitment Center.  
16 Appellant argues that the reason for the revocation of his license, a consensual sexual relationship  
17 with a client, is unrelated to his job at the Special Commitment Center, which requires that he work  
18 with male offenders. Appellant asserts BART acted in an arbitrary and capricious manner and that  
19 nothing in his background indicates that he is of any danger to male inmates. Appellant asks that he  
20 be reinstated and granted every remedy allowed by law.

#### 21 22 **IV. CONCLUSIONS OF LAW**

23 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

24  
25 4.2 On an appeal of a non-disciplinary separation for background check disqualification, the  
26 appointing authority has the burden of supporting both the basis for the action taken and compliance

1 with the merit system law(s) or rule(s) governing the action. Akridge v. Dep't of Social & Health  
2 Services, Case No. SEP-01-0001 (2003).

3  
4 4.3 The scope of our review here is whether Respondent DSHS' action and application of  
5 Personnel Policy 532 complied with WAC 356-30-012. The standard of review for employee  
6 background checks is described in WAC 356-30-012(4), which states in relevant part:

7 The secretary of the department of social and health services shall use the results  
8 of a background check solely to determine the character, competence and  
9 suitability of a person for a covered position. The background check information  
shall consist of:

10 (a) Conviction records, pending charges, and disciplinary board final decisions.

11 (b) Evidence that substantiates or mitigates convictions, pending charges, and  
disciplinary board final decisions including, but not limited to:

12 (i) The employee['s] ...background check authorization and disclosure form;

13 (ii) The employee['s].... age at the time of conviction, charge, or disciplinary  
board final decision;

14 (iii) The nature and severity of the conviction, charge, or disciplinary board final  
decision;

15 (iv) The length of time since the conviction, charge or disciplinary board final  
decision;

16 (v) The nature and number of previous offenses;

17 (vi) Vulnerability of the child, vulnerable adult, or individual with mental illness  
or developmental disabilities to which the employee ... will or may have  
unsupervised access; and

18 (vii) The relationship between the nature of the conviction, pending charge, or  
disciplinary board final decision and the duties of the employee....

19  
20 4.4 Appellant does not dispute that his registration to practice as a counselor in the state of  
21 Washington was revoked. If a basis for disqualification exists, the Board will not substitute its  
22 judgment for BART's evaluation of the character, competence and suitability of Appellant for a  
23 covered position (see Akridge). Appellant received notice from BART that he was disqualified  
24 from working in his covered position. Appellant was subsequently provided with an opportunity to  
25 meet with members of BART at an in-person Mitigating Circumstances Review and present  
26 mitigating evidence as to why he should be allowed to remain working in his covered position.

1 That mitigating evidence was reviewed by BART, who later notified Appellant that their  
2 determination remained unchanged. Therefore, Appellant remained disqualified from working in a  
3 covered position.

4  
5 4.5 We are troubled by BART's process of "automatically" disqualifying Appellant from  
6 remaining in a covered position prior to considering Appellant's mitigating information.  
7 Nonetheless, BART did consider Appellant's mitigating information. Therefore, the process  
8 through which BART determined Appellant was disqualified from working in a covered position  
9 was consistent with the intent of WAC 356-30-012.

10  
11 4.6 Under WAC 356-30-012(5)(g), "interim measures" (such as use of accrued vacation) may  
12 be used while the appointing authority "explores the availability of actions." This period of time is  
13 not to exceed 30 calendar days except in cases where there are investigations of pending charges.  
14 The appointing authority may take any of the actions provided in WAC 356-30-012(5), including  
15 job restructuring, job reassignment, voluntary demotion, voluntary resignation, nondisciplinary  
16 separation or disciplinary action for cause. WAC 356-30-012(5)(h) states: "When considering the  
17 above actions, the agency will consider the least restrictive means necessary to prevent  
18 unsupervised access [to vulnerable persons]." WAC 356-30-012(5) sets forth the alternatives  
19 beginning with the least restrictive (job restructuring) and ending with the most restrictive (non-  
20 disciplinary separation and disciplinary action for cause) (See Akridge).

21  
22 4.7 Here, Superintendent Seling did not consider job restructuring or job reassignment because  
23 all positions at the Special Commitment Center, with the exception of two administrative positions,  
24 were "covered." Superintendent Seling concluded that no viable options existed for Appellant to  
25 remain an employee at the Special Commitment Center. The department then conducted a vacancy  
26

1 run to determine whether a position existed to which Appellant could voluntarily demote. The  
2 search was limited to vacancies that existed on April 7 in Pierce and Kitsap Counties.

3  
4 4.8 Neither WAC 356-30-012 nor Personnel Policy 532 limits the procedures and/or  
5 geographical areas to search for existing vacancies under these circumstances. Furthermore, the  
6 rule anticipates that the appointing authority will conduct an active and on-going search of  
7 “available actions” during the entire 30-day period (See Akridge).

8  
9 4.9 Therefore, we conclude that the consideration of available options provided to Appellant  
10 was unduly restrictive and did not afford him a reasonable opportunity to find an alternative  
11 position with DSHS.

12  
13 4.10 In keeping with our decision in Akridge, the remedy for the rule violation described above  
14 will not punitively require full reinstatement and payment of back pay and allowances for the  
15 months since Appellant was separated from employment. Rather, DSHS shall conduct an expanded  
16 search for all vacancies in positions that are not covered positions and for which Appellant meets  
17 the minimum qualifications. This renewed vacancy search shall begin not later than ten days  
18 following the date of this order and will continue for a minimum period of 30 days, during which  
19 time Appellant shall be afforded all rights and benefits of employment at a salary commensurate  
20 with his position prior to separation.

21  
22 **V. ORDER**

23 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Steve Hawley is granted in  
24 part and Respondent is directed to conduct an expanded search for all vacancies in positions that are  
25 not covered positions and for which Appellant meets the minimum qualifications. This renewed  
26 vacancy search shall begin no later than ten days following the date of this order and shall continue



1 for a minimum period of 30 days, or until such time as a position is offered to Appellant, whichever  
2 is less, during which time Appellant shall be afforded all rights and benefits of employment at a  
3 salary commensurate with his position prior to separation.

4 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.  
5

6  
7 WASHINGTON STATE PERSONNEL APPEALS BOARD

8  
9 \_\_\_\_\_  
Gerald L. Morgen, Vice Chair

10  
11 \_\_\_\_\_  
Busse Nutley, Member

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26